No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROL WHITLEY, et al.,

Petitioners,

v.

GERALD ALBERS

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Is the Eighth Amendment prohibition of cruel and unusual punishments violated, so as to expose prison officials to liability for damages under 42 U.S.C. § 1983 for their use of deadly force in quelling a prison riot, when some evidence, viewed in a light most favorable to an injured prisoner, establishes nothing more than an unprivileged common law battery?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is under review are: Gerald Albers (respondent herein); Harol Whitley, individually and as Assistant Superintendent of the Oregon State Penitentiary (OSP); Hoyt C. Cupp, individually and as Superintendent of OSP; J.C. Keeney, individually and as Assistant Superintendent of OSP; and Robert Kennicott, individually and as a corrections officer at OSP, (petitioners herein).

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The opinion of the Ninth Circuit Court of Appeals is reported as *Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984), (P.C., App. A).[1] The opinion of the United States District Court is reported as *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982), (P.C., App. B).

JURISDICTION

The Ninth Circuit's opinion was dated and filed on October 1, 1984. The judgment under review was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari was timely filed on December 31, 1984, and allowed by this Court on June 10, 1985.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV provides in pertinent part:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or

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[1] As used in this brief, the abbreviation "P.C., App." refers to the appendix to the petition for writ of certiorari.

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Respondent Albers, an inmate at the Oregon State Penitentiary (OSP), filed a complaint in the United States District Court for the District of Oregon under 42 U.S.C. § 1983, pursuant to 28 U.S.C. § 1343. Albers sued for money damages from the four state penitentiary officials who are the petitioners in this Court: Harol Whitley, the security manager of the facility; Hoyt Cupp, the superintendent; J.C. Keeney, the assistant superintendent; and Robert Kennicott,[2] a corrections officer. Specifically, Albers sought damages for injuries he sustained when he was shot in the knee by defendant Kennicott while prison officials were quelling a prison riot at OSP.[3]

On June 27, 1980, Albers was a prisoner housed in Cellblock "A" at OSP, a maximum security prison. (J.A. 13, Tr. 277). The cellblock houses over 200 inmates. (Tr. 55). During the evening several inmates in the cellblock became agitated by what they viewed to be mistreatment by prison guards of other inmates being escorted through the cellblock. (J.A. 14-15). An early "cell-in" order was given. Some inmates resisted the cell-in order and began to

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[2] In the Complaint and in all succeeding documents, this defendant's name was spelled Kennecott. *See* J.A. 2. The proper spelling is Kennicott.

[3] At trial in the District Court, the parties entered into a partial factual stipulation that was read to the jury by the trial judge. (Tr. 53-60). The stipulation is reproduced at J.A. 13-18. All facts set out in the stipulation and in the Statement of the Case are cited herein as "J.A. ____." Also, specific testimony, relating to the officials' decision to use physical force to quell the prison riot and to expert opinions concerning the use of force in this case, is further set forth in Appendix A of this brief.

break furniture. (J.A. 15). Inmate Richard Klenk, who Albers thought was high on "drugs or something" (Tr. 117), became particularly upset. (J.A. 15). After confronting two guards, Klenk assaulted one of them. (Tr. 489). The assaulted guard left the area to report the disturbance. (Tr. 489). The other guard was taken hostage by the inmates and moved to cell 201 on the second floor of the cellblock. (J.A. 16). Some fighting broke out among inmates. (Tr. 106-07, 374).

After prison authorities were notified of the disturbance, security manager Whitley went to speak with Klenk. (J.A. 15-17). Attempts were made to demonstrate that the inmates about whom the prisoners were originally concerned were unharmed. (Tr. 160). The disturbance, however, continued. (Tr. 370-72). Whitley checked the condition of the prison guard being held hostage and found him to be unharmed. (J.A. 16).

Whitley then began organizing an assault squad. (Tr. 372-73). At some point, prison officials discovered Klenk had a knife (J.A. 16), and they learned he had claimed to have killed one inmate and that others would die. (Tr. 372). Klenk also threatened to kill the hostage if prison officials attempted to regain control of the cellblock. (Tr. 231, 369).[4] Whitley returned to the cellblock to see that the hostage was still unharmed. (J.A. 16). He was told by other inmates that they would protect the guard. (J.A. 16-17).

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[4] Specifically, Klenk told Whitley:

> You get the TV in here, Channel 6, Channel 8. I'm running this goddamned place. I've got Fitts as hostage, and I will personally cut his fucking throat if you rush this block.

(Tr. 370).

Albers left his cell at an inmate's request to see whether he could aid in quieting the disturbance. (Tr. 110-11, 185-86). Albers asked Whitley if he would return with a key to the lower tier cells to allow prisoners on the lower tier, including several elderly inmates, to remove themselves from the commotion. Whitley said that he would return with the key. (Tr. 115-16). As Whitley left, he discovered that the inmates had constructed a barricade that limited access to the cellblock. (Tr. 373).

When the disturbance first broke out prison officials made a preliminary decision to respond with tear gas. (Tr. 213, 372-73). They then discovered that the inmates had moved and strengthened their barrier (Tr. 215, 373-74), making it impossible for more than one person at a time to enter the cellblock. (Tr. 373-74, 379). They also learned that the only other door had been blocked. (Tr. 350). Defendants believed that it would not be possible to put sufficient gas into the cellblock quickly enough to affect the rioters and to prevent hostile inmates from harming the hostage. (Tr. 379, 467, 499-500, 510-11). The prison officials discussed the situation and agreed that tear gas could not be used. (Tr. 374-75, 510-11).

Superintendent Cupp thereupon ordered Whitley to take a squad armed with shotguns into "A" block. (Tr. 511). The plan was for Whitley to talk to Klenk one more time and attempt to get the hostage freed without force. If that failed, Whitley would start over the barricade, and try to stop Klenk before he could get to the hostage. Three guards armed with shotguns would follow Whitley. (Tr. 355). The shotguns were loaded with number six birdshot. (Tr. 248). Their instructions were to fire a warning shot (Tr. 218, 375, 397, 458), then to shoot low at anyone going up the stairs toward cell 201

where the hostage was being held. (Tr. 218, 238-39, 248, 375, 397, 458).

Whitley, followed by the three armed guards, reentered the cellblock. There is evidence that Albers asked Whitley for the key he had requested. Klenk refused to release the hostage, and Whitley started over the barricade. Klenk took out a knife and headed up the stairs. (Tr. 376). Whitley screamed "shoot the bastards" (Tr. 118)[5] as he ran toward the stairs in pursuit of Klenk. The stairway was the only route to the cell where the guard was held hostage. (Tr. 227). It was also the only route by which Albers could return to his own cell. (Tr. 227).

Warning and second shots were fired. (J.A. 17). Whitley chased Klenk to the upper tier and subdued him, with the help of several inmates, outside the door to the cell where the hostage was being held. (J.A. 17). Meanwhile, Albers was shot in the knee by Kennicott when Albers ran up the stairs behind Whitley. (J.A. 17).

The hostage guard was released unharmed. (J.A. 18). One other inmate was shot on the stairs (Tr. 225), and others on the lower tier also were injured by gunshot. (Tr. 526).

At trial before a jury, Albers presented, *inter alia*, two experts who testified that other measures, less drastic than those taken by the prison officials, could have been used to

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[5] In deposition testimony introduced by the plaintiff, Whitley testified:

> I was screaming, "Shoot Klenk; shoot that god-damned Klenk."
>
> . . . .
>
> [Klenk] had a knife, he threatened to cut a throat. He pulled a knife out and started off for the stairway. I thought if I screamed loud enough I would scare him enough that he would run past the cell. I thought if I was right behind him hollering, "Shoot him," he would go beyond the cell.

(Tr. 231.)

quell the disturbance. Lou Brewer characterized the actions taken by defendant prison officials as deadly force, and stated his opinion that deadly force was excessive. (Tr. 266). He testified that a number of alternatives to deadly force could have been employed, including communicating with Klenk (Tr. 262, 279), using gas, riot batons and shields (Tr. 264), and taking a direct disabling action against Klenk. (Tr. 266). He acknowledged, however, that riot batons could have caused death or permanent disability (Tr. 289), and he was unable to estimate the time it would have taken for gas to be effective in A Block. (Tr. 283-84).

In the opinion of plaintiff's expert Lee Perkins, the defendants were "possibly a little hasty in using the firepower on [the inmates]." (Tr. 314). He suggested as alternate actions the use of riot formations and entry through a door into the second tier (Tr. 311), or storming the barricade and sealing off the stairwell. (Tr. 313). Mr. Perkins also suggested that a rifleman could have been posted to "immobilize" anyone going to cell 201 "with one shot." (Tr. 311). The fact that it would have been necessary to shoot past as many as fifty inmates to do so did not change his view. (Tr. 316).

Defendants' experts controverted the testimony of Albers' experts. Defendants' expert W. James Estelle testified that the performance of defendant prison officials was consistent with modern accepted prison riot control procedures. (Tr. 437). He was of the opinion that gas would have been ineffective because there was no way to get the massive amount of gas needed into the cellblock before the rioters could have reached the cell where the hostage was held. (Tr. 439). Estelle testified that, given the circumstances of this case, verbal warnings would have further endangered the hostage by alerting the principal inmate rioter and his supporters. (Tr. 438, 450). Mr. Estelle stated his opinions that the use of shotguns

under instructions to shoot any inmate heading for cell 201 was both reasonable and necessary under the circumstances, and that he would have difficulty giving an example of "more courageous and appropriate action by a group of corrections personnel under that kind of trying circumstances." (Tr. 437).

Defendants' expert Roger W. Crist agreed that the defendants' use of firearms was reasonable and that less forceful alternatives were not reasonably available. (Tr. 552). Mr. Crist testified that the option of attempting to talk to the rioters had been exhausted as a reasonable alternative. (Tr. 547, 558-59).

In Mr. Crist's view, an attempt by Whitley individually to disable Klenk would have had the probable effect of causing other inmates to jump in on Klenk's side. (Tr. 550-51). The narrow space for entry and the barricade combined, in Mr. Crist's opinion, to make it impossible to get sufficient manpower in quickly enough to make riot batons practical. (Tr. 551). Mr. Crist agreed with the defendants and Mr. Estelle that verbal warnings before coming in with force would have tipped the officials' hand about their intention. Mr. Crist testified that under the circumstances of this case the warning shot was much more effective than a verbal warning would have been. (Tr. 554, 556, 563).

Mr. Crist endorsed the order to shoot inmates headed toward cell 201. He characterized the instructions to shoot toward those headed to cell 201 as reasonable "particularly in view of the fact that the orders were to shoot low, so the intent was not to kill anyone, but to provide the least amount of damage and still control the situation." (Tr. 552). He described the defendants' response as "almost a textbook model" of modern accepted prison riot control procedures. (Tr. 553-54).

At the conclusion of the trial defendant prison officials moved for a directed verdict on the basis that plaintiff Albers' evidence was insufficient to permit the jury to find a violation of Albers' Eighth Amendment right not to be subjected to cruel and unusual punishment. The district court granted the motion on this ground and, alternatively, on the ground that defendants were immune from suit. The court entered a written decision. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982).

Respondent appealed to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The Ninth Circuit reversed the judgment of the district court. *Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984). It held that Albers presented sufficient evidence of an Eighth Amendment violation. It ruled that, based on the expert testimony presented, "a jury could have concluded that the prison officials' 'riot plan' was hopelessly flawed and that the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." 743 F.2d at 1376. The Ninth Circuit also addressed petitioners' qualified immunity claim. It held that upon retrial, if a jury should conclude that Albers was subjected to cruel and unusual punishment, the defense of qualified immunity would not be available to petitioners. *Ibid.*

SUMMARY OF ARGUMENT

The issue for this Court's resolution is under what circumstances, and by what test, the selective use of potentially deadly force to stop a prison riot and save a hostage's life violates the Eighth Amendment's Cruel and Unusual Punishments Clause. A corollary issue is whether the defendant prison officials are entitled to immunity.

(1)

In resolving the plaintiff inmate's claim of an Eighth Amendment violation, the Ninth Circuit Court of Appeals applied an analysis that equates the constitutional inquiry with the inquiry that would be made in a common law assault and battery case. The lower appellate court's focus was on the existence of less forceful alternatives that arguably could have been used to regain control, and whether the force used was therefore unreasonable or excessive in relation to the danger. Under the Ninth Circuit's decision, a jury is free to disagree with the judgments made by prison administrators and to disregard wholly all evidence of their soundness. On the basis of differing opinions among corrections experts about what riot control plan is best, a jury can find, in the Ninth Circuit's view, that the riot control plan followed resulted in unconstitutionally cruel and unusual punishment. The Ninth Circuit was plainly wrong.

Although we have no disagreement that the Eighth Amendment is the proper constitutional basis for the plaintiff's challenge, we disagree that the evidence was adequate to create a jury question on whether there was a violation. Not all aspects of incarceration constitute punishment, even those which may be harsh. Moreover, not all punishments are constitutionally offensive. The Eighth Amendment proscribes only "cruel and unusual punishments," and as such it marks an outer boundary. The prohibition properly extends to the wanton infliction of unnecessary pain, and to serious injuries or deprivations of basic human needs that result from deliberate indifference. To be unnecessary in the constitutional sense, the action taken by prison officials must be such that no one would suggest it has any penological justification. To be wanton or a consequence of deliberate indifference, the pain must be inflicted purposefully for the sake of inflicting pain, or inflicted with such extreme indifference

that the mental state of the actor fairly equates with punitive intent. To require less is to elevate pure accidents and common civil torts to the status of "cruel and unusual punishments," a proposition that this Court soundly has rejected.

The constitutionality of measures taken to control a riot cannot be evaluated merely by reference to the possible use of less forceful alternatives, as the Ninth Circuit's tort-like standard inevitably invites. A prison administrator is not required to select the least restrictive, as opposed to most effective, means of responding to a life-threatening emergency, and inmates have no constitutional right to be free from all but the least drastic measures conceivable to control a prison riot. The correct inquiry is not whether in someone else's estimation less stringent measures would be equally effective, it is only whether the actions taken were constitutional. If the force used made a measurable contribution to a legitimate penological objective, and did not sweep so far beyond that objective to allow the inference of a punitive intent, there can be no constitutional objection to its use.

In undertaking this analysis, the scope of a court's review must be carefully circumscribed. The task of running prisons and making the wide-range of judgments called for in responding to security concerns is expressly committed to the legislative and executive branches of government. Particularly in the context of an official response to a prison riot, a court must limit its inquiry to the demands of the constitution and not be tempted to second-guess prison administrators about what plan is best. Development of a riot-control plan calls for substantial familiarity with the inmates themselves and the physical structure of the institution. It requires training and experience in riot control techniques. Delicate predictions and informed decisions must be made swiftly in the attempt to accommodate the conflicting safety interests of the hostage,

prison personnel, and the inmates. Prison administrators therefore must be accorded considerable latitude and deference. Unless their decisions are shown conclusively to be wrong, they should not be declared unconstitutional.

Analyzed under proper constitutional standards, the evidence in this case was inadequate even to create a jury question on the existence of a violation. Plaintiff did not claim, and the evidence did not suggest, that the actions taken by prison administrators were for any motive other than the proper purpose of regaining control and saving the hostage. The most plaintiff was able to establish was that corrections experts hold differing opinions on how best to respond to riots. Plaintiff's entire case was predicated on the existence of less forceful means that, in the judgment of plaintiffs experts, should have been used in response. At best, plaintiff only established that the question of the propriety of the action taken by the defendant officials was a classic matter for the informed judgment of the responsible prison administrators. Plaintiff failed altogether to provide proof that the actions taken made no measurable contribution to prison security or that they were otherwise wholly without penological justification. The district court's judgment was correct, and the Ninth Circuit's reversal of that judgment and the rationale of its decision were patently in error.

(2)

The Ninth Circuit not only misconstrued the Eighth Amendment, it also misanalyzed the state prison officials' claim of qualified immunity. Its decision to strip petitioners of their entitlement to immunity cannot be squared with this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

First, the Ninth Circuit court erroneously concluded that if state prison officials violated a plaintiff inmate's Eighth Amendment rights when they used physical force in quelling a

prison riot, they necessarily lost their right to claim qualified immunity. This astounding conclusion was based upon the court's circuitous reasoning that the analysis of an Eighth Amendment claim and of a qualified immunity claim so overlap that findings on the two issues are "mutually exclusive." This misanalysis flies in the face of *Harlow*'s teaching that a defendant's immunity claim is conceptually distinct from the merits of a plaintiff's claim that his constitutional rights have been abridged. Contrary to *Harlow*, its precursors and its progeny, the court of appeals held that defendant prison officials would lose their immunity by their deliberate indifference to a right, without first determining whether the right to which defendants allegedly were indifferent was "clearly established."

Thus, the Ninth Circuit failed to undertake the crucial inquiry whether the plaintiff inmate's claimed constitutional right to be free from the use of deadly force to quell a prison riot and to rescue a hostage had been clearly established. The Ninth Circuit majority reversed the district court judge and ignored the court of appeals dissenter, both of whom correctly pointed out that no prior federal court decision had countenanced a cause of action for cruel and unusual punishment arising from a prison disturbance. Blinded by its merger of the immunity claim with its resolution of the merits, the majority failed to perceive the significance of this fact. No inmate right to be free from deadly force in suppressing a prison insurrection had been clearly established; nor had an inmate's right to be free from all but the least amount of force conceivable been established by any prior authority. The Ninth Circuit's majority decision is the first to create such rights.

By holding the defendants accountable for allegedly violating a right the court itself first recognized in their case, the

Ninth Circuit violated yet another precept of *Harlow*. As this Court's recent decision in *Mitchell v. Forsyth*, ___U.S. ___, 105 S.Ct. 2806, 2820 (1985) reiterates, *Harlow* rejected such "hindsight reasoning on immunity issues" and "teaches that officials performing discretionary functions are not subject to suit when . . . questions [about the legality of measures taken by them] are resolved against them only after they have acted." The decisions of other circuit courts, upon which the Ninth Circuit relied in crafting its new and, we submit, erroneous Eighth Amendment standard are so factually distinguishable and too untimely under *Harlow* and *Forsyth* to support a conclusion that the right discerned by the Ninth Circuit and allegedly violated by the defendants was clearly established in June, 1980.

In light of the dearth of settled authority, the disagreement between the district court and the Ninth Circuit, the divergence of opinion in the lower appellate court panel and this Court's exercise of its discretionary authority to review the substantive issue presented, defendants cannot be deemed to have violated a clearly established right. This Court should hold, therefore, that defendants were entitled to immunity, and reverse the contrary decision of the court of appeals.

ARGUMENT

I. Introduction

This case presents two critical aspects concerning the liability of prison officials for money damages under 42 U.S.C. § 1983. The State of Oregon has asked this Court to decide what standard of analysis applies to an Eighth Amendment claim of cruel and unusual punishment based on the use by prison officials of injurious and potentially deadly force in their response to an inmate riot. A corollary issue is whether, if an Eighth Amendment violation occurred, the defendant state prison officials are entitled to qualified immunity.

The Ninth Circuit Court of Appeals resolved these issues against the defendants. The State of Oregon sought review by this Court because the lower appellate court's decision stands as an unwarranted impediment to the ability of prison officials to carry out their responsibilities relating to internal prison security.

In this case, state prison administrators and officers at Oregon's largest maximum security prison faced an extremely volatile situation, an inmate riot in an open cellblock housing over 200 inmates. A prison guard was held hostage for over two hours by an armed inmate who repeatedly threatened to kill the guard as well as other inmates, and who reported that he already had killed one inmate. Several attempts by prison officials to negotiate the guard's release failed. The unsuccessful negotiations took place against a background within the cellblock of uproar and commotion which included fighting and threats among inmates, the destruction by inmates of most of the cellblock furniture, and the blocking and barricading of the cellblock doors to prevent inmates from leaving and prison officials from entering. Ultimately, the defendant prison officials were successful in quelling the riot and freeing the hostage with no loss of life, although some inmates, including plaintiff, were injured as a result of the force used by the officials.

Plaintiff filed suit under 42 U.S.C. § 1983, seeking money damages and claiming that the force used by prison officials violated his Eighth Amendment right to be free of cruel and unusual punishment. He presented experts at trial who testified to alternative and, in their judgment, less drastic means that they believed should have been used to attempt to stop the riot. Defendants also presented corrections experts. Those experts testified that the actions taken by the prison administrators were appropriate, and that the alter-

native precedures proposed by plaintiff's experts would have been less effective, ineffective or might even have aggravated the danger.

At the conclusion of the evidence, the district court granted the defendants' motion for directed verdict. The trial judge held that, even viewed in a light most favorable to plaintiff, the evidence of "excessiveness" of force did not rise to the level of an Eighth Amendment violation. 546 F.Supp. at 735. Alternatively, the district court directed a verdict for defendants on the ground that they were immune from liability. *Id.* at 737. The Ninth Circuit Court of Appeals disagreed on both points . It reasoned that the conflict in evidence on whether the force used was excessive was sufficient to raise a jury question on the existence of an Eighth Amendment violation. 743 F.2d at 1376. It also concluded that no qualified immunity defense would be available if an Eighth Amendment violation was found. *Ibid.* The decision of the Ninth Circuit significantly diluted both the meaning of the Eighth Amendment's prohibition against cruel and unusual punishments and the doctrine of qualified immunity. For the reasons set forth below, the Ninth Circuit's decision should be reversed and the district court judgment for defendants should be reinstated.

II. The Ninth Circuit Court of Appeals Adopted An Incorrect Eighth Amendment Analysis and Erroneously Exposed Defendants to Liability.

A. The Standard Employed by the Ninth Circuit Court of Appeals Equates With the Standards for the Common Law Tort of Assault and Battery and the Defense of Privileged Use of Force.

The Ninth Circuit's resolution of this controversy failed properly to accommodate the fundamental values of the Eighth Amendment and basic limitations on appropriate

judicial scrutiny. The lower appellate court ritualistically spoke in terms of "unnecessary and wanton infliction of pain" and "deliberate indifference," and it gave passing acknowledgment to the need to accord prison administrators "reasonable latitude" in determining the appropriate response to a crisis. 743 F.2d at 1374, 1375. In deciding plaintiff's Eighth Amendment challenge, however, the Ninth Circuit abandoned those principles. Effectively, the appellate court announced an evidentiary standard pursuant to which almost every Eighth Amendment claim arising from a prison riot must be treated as a jury question. Juries will be at full liberty to second-guess prison administrators and to find liability if they differ in their opinion of what action should have been taken.

The defect in the Ninth Circuit's reasoning was that it ultimately used an evidentiary standard for "excessiveness" that equates with what would be required in a common law tort case. The Ninth Circuit stated:

> In our view, a proper standard deems the eighth amendment to have been violated when the force used is "so unreasonable or excessive [as] to be clearly disproportionate to the need reasonably perceived by prison officials at the time." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). Thus, if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was *unnecessary*, Albers' constitutional right would have been infringed. . . .

743 F.2d at 1375 (emphasis added).

The Ninth Circuit's opinion pointed to evidence that the riot was "subsiding" at the time of the official action as support for an inference that the force used was excessive. 743 F.2d at 1376. Although we disagree that the evidence supports this characterization,[6] it was not the essential

[6] Even viewing the evidence in the light most favorable to plaintiff, this

(Footnote continued on next page)

focus of the Ninth Circuit's opinion. The evidence upon which the panel majority concluded that an Eighth Amendment violation could be found was the testimony of plaintiff's experts.

The lower appellate court discussed and canvassed more extensively the conflict in the expert testimony on whether less drastic measures could have and should have been used to stop the riot. In reviewing that evidence, the court noted the testimony of Mr. Brewer that a verbal warning rather than a warning shot should have been given and that the use of deadly force was premature. The Ninth Circuit below also pointed to Mr. Perkins' testimony of possible alternative responses and his opinion that officials were "possibly a little hasty in using firepower" on the inmates. The Ninth Circuit then declared that it "was the jury's function to weigh the experts' testimony on the basis of each expert's experience, knowledge, and opportunity to observe." 743 F.2d at 1376. Thus, the Ninth Circuit held that from the evidence of alternatives involving a lesser degree of force, the jury could conclude that the riot plan was "hopelessly flawed" and that the use of deadly force was "unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." *Ibid.*

This holding by the Ninth Circuit effectively grafts the common law tort standards for assault and battery and defensible use of force onto Eighth Amendment analysis. The inquiry for the jury in such a case is whether the degree of force used was unreasonable or excessive in relation either to real danger, or to danger reasonably believed to exist. To meet

(Footnote continued from previous page)

is a misleading characterization. At most, a trier of fact could conclude that the riot had quieted and the atmosphere of destruction had subsided. The danger was far from past: The hostage was still being held at knifepoint, Klenk still was threatening to take lives, negotiations had not proven fruitful, and the cellblock still was under inmate control. At best, the conflict was in stalemate.

this standard it must be shown that the actor considered whether lesser force would prevent the apprehended harm. *See*, Prosser and Keeton on Torts, §§ 19 and 20 (Fifth Ed. 1984); Restatement (Second) of Torts, § 70(1), comments b and c. *Cf. Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (Damages sought for death and injuries from gunfire used by police to stop student riot).

Thus, the Ninth Circuit created a jury question under the Eighth Amendment on precisely the same basis that a jury question would be created for a tort action. The unreasonableness or excessiveness of harm is determined in relation to less forceful alternatives. The jury is free to disagree with the judgment of prison administrators on the security justifications for the use of force, and the jury may elevate the professional opinions they prefer over those they find less persuasive. Under the Ninth Circuit's analysis, wherever there is disagreement among corrections experts about the best plan for response to a riot, and wherever an inmate is injured by the response made by the responsible administrators, a jury is free to find an Eighth Amendment violation.

The Ninth Circuit's analysis unquestionably is wrong. This Court's jurisprudence establishes that the Eighth Amendment standard for "cruel and unusual punishments" is much more demanding, and that the role of courts and juries in reviewing the security actions of prison administrators is much more limited.

B. The Eighth Amendment Standards Recognized by this Court Are More Rigorous Than the Common Law Tort Standard Adopted by the Ninth Circuit.

1. *Applicability of Eighth Amendment Cruel and Unusual Punishments Clause.*

We have no quarrel with the proposition that where, as here, a lawfully committed prison inmate asserts that his

personal security has been unconstitutionally infringed by prison officials, the claim properly is analyzed under the Eighth Amendment Cruel and Unusual Punishments Clause. A prisoner's conviction follows a full panoply of procedural protections. Compliance with those procedural protections and the fact of conviction entitles the state to classify an individual as a "criminal" and to incarcerate him. *See Ingraham v. Wright*, 430 U.S. 651, 669 (1977). Given a valid conviction, an inmate's general liberty interest, which includes the right to personal security,[7] is "extinguished" to the extent that the state may confine him in any of its prisons, even those most restrictive; the inmate then is subject to the rules of the prison system so long as the conditions of confinement do not otherwise violate the constitution. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).[8]

That is not to say, however, that an inmate retains no protected liberty or personal security interest. The Eighth Amendment Cruel and Unusual Punishments Clause serves as the principal constitutional reservoir of that interest. Unlike the provisions of the Constitution of general application (*e.g.*, equal protection, religious exercise, free speech), the Eighth Amendment specifically is directed to those convicted of crimes. *Cf. Ingraham v. Wright*, 430 U.S. at 669-71. Upon conviction, a sentenced inmate may be

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[7] *Ingraham v. Wright*, 430 U.S. at 673; *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

[8] Although the liberty interests deriving from the Due Process Clause itself are extinguished by the fact of lawful criminal conviction, the procedural protections of the Due Process Clause operate with respect to protected liberty interests created by state law or marked by other provisions of the Constitution. *Compare Meachum v. Fano*, 427 U.S. 215 (1976) *with Wolff v. McDonnell*, 418 U.S. 539 (1974).

punished, although that punishment may not be cruel and unusual. *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979). Thus, the scope of a convicted inmate's constitutionally protected personal security interest is marked by the boundaries of the Cruel and Unusual Punishments Clause.[9]

This Court has not hesitated to test the constitutionality of prison conditions, disabilities or restraints that infringe personal security or other physical liberty interests under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Physical brutality against prison inmates has been viewed as "part of the total punishment to which an individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." *Ingraham v. Wright*, 430 U.S. at 669. Disabilities and suffering from unmet medical needs similarly are within the purview of the Eighth Amendment. *Estelle v. Gamble*, 429 U S. 97 (1976). Because confinement in a prison is itself a form of punishment, the conditions of that confinement cannot exceed the limits imposed by the Eighth Amendment. *See Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).

For these reasons, the Eighth Amendment prohibition against cruel and unusual punishments is the proper constitutional source of protection for an inmate injured by force used in a prison riot. That acknowledgment only begins the critical inquiry; the question remains whether the Eighth Amendment guarantee has been violated.

2. *Interpretation of the Cruel and Unusual Punishments Clause.*

The language of the Eighth Amendment is straightforward. It prohibits the infliction of punishments which are

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[9] We recognize that other provisions of the Constitution, such as the search and seizure protections of the Fourth Amendment, safeguard more narrow personal security interests (*e.g.*, privacy). We refer here only to the more generalized liberty/personal security interests of the due process clause.

"cruel and unusual." But as this Court has observed, the nature of the clause is not exact. Its words are not precise, and there is very little evidence of the framers' intent in including the clause among the restraints on government enumerated in the Bill of Rights. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring). For these reasons, the ban on cruel and unusual punishments has been identified as "one of the most difficult to translate into judicially manageable terms." *Id.* at 376. (Burger, C.J., dissenting). However, the Eighth Amendment jurisprudence of this Court has been plentiful, particularly during the past two decades. As a consequence, certain general principles relevant to government's authority to impose punishment for criminal conduct have become settled.

It is clear, first of all, that not all actions constitute punishment in the constitutional sense. Certainly that is true in the context of challenged legislative action. Statutes that impose disabilities for reasons traditionally associated with punishment — that is, to reprimand the wrongdoer or to deter others — properly come within the scrutiny of the Eighth Amendment; statutes that impose disabilities to accomplish some other legitimate governmental purpose do not. *Trop v. Dulles*, 356 U.S. 86, 96 (1958). *See generally Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Similarly, not everything that happens to an inmate while in prison is properly characterized as punishment, even though the fact of his incarceration unquestionably is punitive in nature. Obviously, rehabilitative training, sound medical care, recreational athletic programs and the like benefit an inmate, and impose no disability whatsoever. But even less desirable aspects of prison fall short of the constitutional

notion of punishment, such as unpleasant conditions which do not cause pain or result in deprivations of basic human needs. *See generally Rhodes v. Chapman*, 452 U.S. at 347-48.

It is obvious from the literal text of the clause that not all punishments are constitutionally offensive. The state, after a person validly is convicted of a crime, has the power to punish. The question under the Eighth Amendment is whether, in the exercise of that power, the government has been "tempted to cruelty." *Weems v. United States*, 217 U.S. 349, 373 (1909). Only those punishments which rise to the level of cruelty are unconstitutional. *Ibid. See generally Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1946).

In its historical context, the Eighth Amendment proscription against cruelty has been perceived as protecting prisoners from " 'torture' and other 'barbarous' methods of punishment." *Gregg v. Georgia*, 428 U.S. 153, 170 (1976). But the words of the clause have been interpreted "in a flexible and dynamic manner," with the result that the reach of the Eighth Amendment prohibition has been extended beyond its earlier historical applications. *Id.* at 171; *Rhodes v. Chapman*, 452 U.S. at 345. *Cf. Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) ("The standard itself remains the same, but its applicability must change as the basic mores of society change"). Accordingly,

> [t]oday the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," . . . or are grossly disproportionate to the severity of the crime, ... Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification" . . . .

Rhodes v. Chapman, 452 U.S. at 346 (citations omitted).

In the scrutiny of punishments which allegedly involve the "unnecessary and wanton" infliction of pain, the Court's

decisions emphasize that the Eighth Amendment prohibition draws an outer boundary. The same is true of punishments alleged to be grossly disproportionate to the conduct for which they are imposed. The Cruel and Unusual Punishments Clause is not appropriately used to arbitrate between competing legislative or penological philosophies about correct methodology. *See, e.g., Weems v. United States*, 217 U.S. at 378-79, 381; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 470 (Frankfurter, J., concurring). The constitutional concepts of "unnecessary" infliction of pain and "gross disproportionality" are more absolute than they are relative; in a constitutional context they are not established, as they are in the common law tort area, by the availability of or comparison to less harsh alternatives. The Eighth Amendment therefore "[does] not require a legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg v. Georgia*, 428 U.S. at 175. Four members of the Court expressed the same view in *Furman v. Georgia*:

> While the cases affirm our authority to prohibit punishments that are cruelly inhumane . . . and punishments that are cruelly excessive in that they are disproportionate to particular crimes . . . the precedents of this Court afford no basis for striking down a particular form of punishment because we may be persuaded that means less stringent would be equally efficacious.

408 U.S. at 451 (Powell, J., dissenting, joined by Burger, C.J., and Blackmun and Rehnquist, J.J.) (citations omitted). Similarly, the fact that experts knowledgeable about prison administration urge the feasibility of less harsh or more desirable prison conditions does not establish that more harsh conditions violate the Eighth Amendment; such policy views simply do not set constitutional minima. *Rhodes v. Chapman*, 452 U.S. at 348 n. 13.

The Eighth Amendment proscribes the infliction of pain which "no one suggests would serve any penological purpose." *Estelle v. Gamble*, 429 U.S. at 103. Only then is suffering "unnecessary" within the meaning of the Cruel and Unusual Punishments Clause. Similarly, where a punishment is assailed as "grossly disproportionate," it is not unconstitutional unless it "serves no valid legislative purpose," *Furman v. Georgia*, 408 U.S. at 331 (Marshall, J., concurring), or is "pointless" *id.* at 279 (Brennan, J., concurring), or "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In short, a punishment to be cruel and unusual must be action which is more or less universally condemned, and not merely conduct about which opinion is fairly divided. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 469-70. (Frankfurter, J., concurring).

The concept that the Eighth Amendment proscribes punishment that is more or less universally condemned is consistent with the concept that the Eighth Amendment reflects standards of decency within our society, and that those standards change as society matures and evolves. *See Trop v. Dulles*, 356 U.S. at 101; *Weems v. United States*, 217 U.S. at 373. The essential point is that the Eighth Amendment is marked by currently accepted standards of decency, not predictions of what the standards may be in some future time.

Also consistent with the "evolving standards of decency" value that inheres in the Eighth Amendment is the recognition that pain, to be cruel and unusual punishment, must be inflicted intentionally, deliberately or through indifference sufficiently extreme to equate fairly with intent. In both its dictionary and ordinary meaning, "cruel" connotes the purposeful infliction of pain for the sake of inflicting pain.[10] Thus, this Court has repeatedly emphasized that, to be unconstitutional, a punishment must involve the unnecessary and *wanton* infliction of pain, *Gregg v. Georgia*, 428 U.S. at 173; the *gratuitous* infliction of suffering, *id.*, at 183; unnecessary *cruelty*, *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); "malevolence" or "purpose" in inflicting pain, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 463, 464; and *deliberate indifference* to physical suffering, *Estelle v. Gamble*, 429 U.S. at 104.

To abandon any requirement of an intentional mental state component or its equivalent for an Eighth Amendment violation is to equate pure accidents and common civil torts with cruel and unusual punishments. Negligently and accidentally inflicted pain is, almost by definition, "unnecessary" and without any penological justification. But this Court has soundly rejected the extension of the Eighth Amendment to such risks, which attend equally to life outside prison walls as well as within. In *Estelle v. Gamble*, in the context of a failure to provide medical treatment to an inmate, this Court was careful to point out that not every act of prison officials which results in pain or anguish is "on that basis alone to be characterized as wanton infliction of unnecessary pain." 429 U.S. at 105. Accordingly,

> an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amend-

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[10] Cruel is defined by one source as "disposed to inflict pain esp. in a wanton, insensate, or vindictive manner: pleased by hurting others . . ." Webster's Third New International Dictionary (1976).

> ment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 105-06. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 464-65 (second attempt at electrocution did not violate Eighth Amendment; failure of initial attempt was an "unforeseeable accident" and there was "no purpose to inflict unnecessary pain").

Several salient principles thus emerge from the Court's Eighth Amendment jurisprudence. The Cruel and Unusual Punishments Clause does not bar punishment, only certain punishments. Implicit in the clause is a recognition that punishment properly is part of an effective criminal justice system. But also reflected in the Eighth Amendment is the declared value that punishment which clearly goes beyond the legitimate aims of our justice system, and which is deliberately inflicted, is not to be tolerated. The infliction of pain for the sake of inflicting pain is proscribed.

Conceptualized in that fashion, the Eighth Amendment marks an outer perimeter of allowable conduct. Short of that line, a wide variety of punishments may serve legitimate criminal justice ends to varying degrees or with variable success. Within society, there may be disagreements about the propriety or desirability of specific punishments, and whether they adequately serve penological objectives. But the Eighth Amendment is not the arbiter of those disagreements. Its purpose is to reach only those punishments that clearly go beyond the outer mark.

3. *Parallel Principles of Analysis Under the Due Process Clause.*

Many of the same principles of analysis apply when the Eighth Amendment is inapplicable and the Due Process

Clause of the Fourteenth Amendment is the source of constitutional protection. In *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Block v. Rutherford* 468 U.S. ___, 104 S.Ct. 3227 (1984), this Court was presented with "cruel and unusual" punishment challenges to security measures followed in jails housing pretrial detainees. Both cases involved constitutional attacks on various institutional policies and practices designed to minimize drug and contraband smuggling into the jail by pretrial detainees. In *Bell*, this Court held that, because the detainees had not yet been convicted of any crime, the appropriate source of constitutional scrutiny was the Due Process Clause, not the Eighth Amendment, and that due process requires that a pretrial detainee not be punished. 441 U.S. at 535 and n. 16. *Accord, Block v. Rutherford*, 104 S.Ct. at 3231. Therefore, the pertinent inquiry in the evaluation of the constitutionality of the challenged conditions or retraints of detention was whether those disabilities "amount to punishment." *Id.* at 535. *Accord, Block v. Rutherford*, 104 S.Ct. at 3231.[11]

Bell and *Block* drew heavily from Eighth Amendment jurisprudence in announcing controlling principles. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), discussed in *Bell v. Wolfish*, 441 U.S. at 537-39 and in *Block v. Rutherford*, 104 S.Ct. at 3231-32. The crucial inquiry in determining

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[11]The Eighth Amendment does not ban punishment *per se*; it forbids only cruel and unusual punishments. Nevertheless, in a challenge under the Eighth Amendment, it is appropriate to ask whether a condition or restraint constitutes punishment at all. We see no principle upon which that inquiry when made under the Eighth Amendment should differ meaningfully from the same inquiry under the Due Process Clause. At least two members of this Court, in separate opinions, have noted that the tests for applying these two provisions are in many ways identical. *Furman v. Georgia*, 408 U.S. at 359 n. 141 (Marshall, J., concurring). *Id.* at 422 n. 4 (Powell, J., dissenting).

if a disability is punishment was declared to be whether it is "imposed for purposes of punishment or whether it is an incident of some other legitimate governmental purpose." *Bell v. Wolfish*, 441 U.S. at 538. Absent proof of intent, the determination "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " *Ibid.* As the Court in *Bell* concluded:

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' . . . Conversely, if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

441 U.S. at 539 (footnote omitted).

Ensuring security and order within a detention facility unquestionably is a "permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both." *Id.*, 441 U.S. at 561. Therefore, actions taken by prison administrators that bear a "reasonable relation" to internal security are not punishment in any constitutional sense. Those inquiries, however, are not satisfied merely by consideration of less restrictive alternatives: Neither "reasonableness" nor "excessiveness" are judged in relation to options that others might adopt. *Block v. Rutherford* emphasizes the point that institutional administrators "are not [constitutionally] required to employ the least restrictive means available." 104 S.Ct. at 3234, n. 10. Thus, there may be many possible alternative responses to any given jail or prison security concern, all or several of

which may be reasonable. Within the range of reasonable alternative responses, one may be be less restrictive than the others, but that does not mean it is the only constitutionally permissible approach. *Bell v. Wolfish*, 441 U.S. at 554. The Constitution simply does not mandate the " 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." *Ibid.*

The decision in *Block* further underscores the point. The district court there acknowledged that many factors supported the institution's policy of not allowing contact visits. Nevertheless, it weighed the effects of a total ban against the security interests furthered and imposed an order requiring the jail officials to follow other procedures. In reversing, this Court held:

> When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility.

104 S.Ct. at 3234.

This holding highlights an important distinction in the analysis of challenges to prison security actions based on constitutional rights of general application as compared to an analysis of challenges based upon either the Eighth Amendment or Due Process Clause proscriptions of punishment. A prisoner retains rights secured by the Constitution's general provisions to the extent consistent with his status as a prisoner and the legitimate goals and objectives of a penal institution. *See, e.g., Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977). There is, accordingly, a "mutual accommodation" between institutional objectives

and the provisions of the Constitution that are of general application. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). This approach in effect requires a balancing of an inmate's interest in exercising a particular right against the institutional interest to be furthered. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). Although institutional security concerns are sufficiently weighty that they often prevail in the balancing process, *see, e.g., Pell v. Procunier*, 417 U.S. 817 (1974), there are occasions when the weight of a general constitutional right will tip the scale in the opposite direction, *cf. Cruz v. Beto*, 405 U.S. 319 (1972).

In assessing a claim of unconstitutional punishment under either the Eighth Amendment or the Due Process Clause, there is no balancing to be done. The constitutional protection begins where the penological purpose ends. Thus, as *Block* points out, under a due process analysis the inquiry ends at the point at which it is acknowledged that security measures taken by institution officials are not without a basis in reason. The same should be true in the Eighth Amendment context. It is not appropriate to weigh the inmate's interest in being free of certain disabilities or restraints against the institution's interest in imposing them. Nor, for constitutional purposes, is it appropriate to consider less restrictive alternatives and declare a challenged decision "excessive" in relation to those alternatives. The inquiry is only whether the action taken is constitutional, not whether some other action would do as well.

4. *Limitations on the Court's Role in Reviewing Prison Security Measures.*

This case requires the Court to consider for the first time the limitations that the Eighth Amendment imposes upon actions taken by prison administrators relating to prison

security.[12] Although the Eighth Amendment issue is of first impression, the general context is familiar. This Court has decided a wide array of cases involving challenges to prison security policies and practices based on constitutional rights of general application, such as First Amendment rights. *See, e.g., Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (free speech); *Pell v. Procunier*, 417 U.S. 817 (1974) (free speech and free press); *Cruz v. Beto*, 405 U.S. 319 (1972) (religion); *Bell v. Wolfish*, 441 U.S. 520 (1979) (due process). In all of these prison litigation cases, one principal point consistently is stressed: The scope of the court's inquiry is to be carefully circumscribed. Time and again, this Court has recognized that the task of managing prisons is extremely complex and difficult, and that the problems facing prison officials in the day-to-day operation of prisons are not susceptible to easy solutions. *See, e.g., Bell v. Wolfish*, 441 U.S. at 547. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 128 (1977); *Pell v. Procunier*, 417 U.S. at 827. The case law pragmatically has acknowledged that state prison administrators, unlike judges, are experts in the management and operation of state prisons. *See, e.g., Bell v. Wolfish*, 441 U.S. at 548; *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). The sensitivity of the decisions they are called on to make, and the recognition that there is no one solution for any of the many intractable problems that face prison administrators, has led to the conclusion that courts must accord prison administrators wide-ranging deference when their decisions and judgments are judicially challenged. This is particularly true with respect to prison security and efforts to

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[12] In *Rhodes v. Chapman*, the respondent inmates argued that "double-celling" created a potential for violence among inmates and possible rioting, and thus violated their Eighth Amendment rights. The Court found the claim to be speculative and unsubstantiated and therefore did not reach it. 452 U.S. at 349 n. 14.

ensure the safety of prison personnel, the inmates, and the public generally. *See Bell v. Wolfish*, 441 U.S. at 547. The simple reality is that prisons, especially maximum security facilities, house the most anti-social, violent and unpredictably volatile members of society. *See generally Hudson v. Palmer*, 468 U.S. ___, 104 S.Ct. 3194, 3200 (1984).

A second often recognized and equally compelling basis for a limited scope of judicial scrutiny stems from the need to preserve a proper balance in the relations among the separate branches of government. The responsibility for prison management is placed in the legislative and executive branches, and courts must bear in mind that their inquiries must reflect the demands of the Constitution rather than a judicial difference of opinion.

> [U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. at 562.

To ensure that judicial decisions reflect constitutional standards rather than a court or jury's different opinion on how a prison should be managed, this Court has insisted on a limited standard of judicial review in constitutional challenges to prison administration. Unless a court can say that prison administrators have been "conclusively shown to be wrong" in their assessment of the security needs of an institution, it is not the province of the courts to declare their actions or

policies unlawful. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 132. *Accord, Bell v. Wolfish*, 441 U.S. at 555.

The sound bases for judicial deference to prison administrators are even more compelling in the context of a prison riot and hostage situation. In no other circumstance is corrections expertise and experience more necessary; in no other setting is quick decision making so crucial. Prison administrators often must act swiftly, in a highly charged atmosphere, and possibly on the basis of limited information. *Cf. Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, ___U.S. ___, 105 S.Ct. 2768, 2774 (1985) (evidentiary standard in disciplinary proceeding is less because of exigencies in prison security matters). The officials' familiarity with their own institutions is uniquely important. As this case demonstrates, prison officials must consider the physical structure in which the riot occurs; the personalities of the inmates; the effects that a riot in one cellblock of the prison may have on other areas of the prison and the danger that violence will spread; the risk to the hostage; the various possible responses; and the dangers to prison staff who must take action to stop the riot, as well as to the inmates caught up in the riot.[13] Development of a riot-control plan calls for

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[13] As this Court has said, in a different context:

> In assessing the seriousness of a threat to institutional security prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long-standing relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The

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specialized training in and knowledge of the correct use and comparative risks and benefits of various riot control techniques. (*See, e.g* , the testimony of defendant Whitley detailing his extensive training in this area (Tr. 367-68)). The variables are so many that there probably is no one best response; necessarily, any response will involve calculated risks. The extent to which prison administrators can fully assess all of the possibilities and all of the variables will depend on the exigencies at hand. Thus, the general observation that prison administrators have "a better grasp of [their] domain than the reviewing judge," *Bell v. Wolfish*, 441 U.S. at 548, is even more compelling in a riot where the life of a hostage is at stake.

C. Application of the Proper Eighth Amendment Standard in Prison Riot Situations Requires Reversal of the Ninth Circuit Decision in This Case.

Due consideration of this Court's Eighth Amendment jurisprudence and proper regard for the policies informing the decisions relating to prison administration reveal the appropriate constitutional standard for review of forceful actions taken by prison officials in suppressing a prison riot. The Eighth Amendment standard for cruel and unusual punishments proscribes the infliction of pain "unnecessarily and wantonly" or with "deliberate indifference." A constitutional violation is not established by simple reference to less harsh alternatives. Rather, the challenged action must be so without penological justification that a court can infer pain was inflicted intentionally for the purpose of inflicting pain, or with deliberate indifference to the suffering that it would cause. Official measures to quell a prison riot, including the

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> judgment of prison officials in this context . . . turns largly on "purely subjective evaluations and on predictions of future behavior" . . . .

Hewitt v. Helms, 459 U.S. 460, 474 (1983).

use of physical force on a prisoner, violate the Eighth Amendment only when the actions make no measurable contribution to the accepted correctional goal of insuring security and order in prisons and jails. *See Coker v. Georgia*, 433 U.S. at 592.

Where prison administrators are, as here, presented with a prison riot in which the lives of prisoners and guards alike are threatened, the cruel and unusual punishments clause rarely will be implicated. In extreme or unusual instances, however, it might be. For example, if injurious force is used after prisoners have relinquished their weapons and attempted to surrender to prison authorities, such force would be without penological purpose in that it would not at that point measurably contribute to the goal of ensuring prison security and order. Similarly, force that by its very nature sweeps far beyond the legitimate penological purpose, such as an order to shoot and kill any and all prisoners out of their cells, would suggest that deadly force was used not for the proper objective of regaining control, but instead to retaliate against and vindictively punish everyone participating in any fashion in the disturbance. The same would be true of an unusual and overbroad means of force, such as napalm. Such hypotheticals suggest the wanton infliction of unnecessary pain which the Eighth Amendment addresses; borderline disputes between experts over the most desirable or least drastic methods of controlling a prison disturbance do not.

Yet that is all that is present in this case. Plaintiff made no claim that the actions taken by prison officials were motivated by anything other than the hope of saving the life of the hostage and the need to regain control of the cellblock; nothing in the facts would support such a claim. Nor was there ever a suggestion that the selective use of potentially deadly force for such purposes is a means which society simply

will not tolerate — that is, that such force more or less is universally condemned.[14] Plaintiff's theory of liability was that less forceful means could have been used to stop the riot and the action taken was premature; from that, plaintiff believed that he had done enough to show that his injuries were "unnecessarily and wantonly" inflicted and that prison officials were "deliberately indifferent."

This case thus reduced to a controversy over whether prison administrators, confronted with a serious prison riot and the imminent risk of loss of life, made an incorrect assessment of how best to defuse that threat and regain control of the cellblock. Whether to use selective shotgun fire or sharpshooters, whether to use verbal warnings or shotgun warnings, whether to negotiate further and risk spread of the riot, whether to use tear gas and risk death of the hostage were classic examples of matters for the informed discretion of the officials who had to take action.[15] Wholly lacking in this case is any suggestion that the judgments they made were outside the realm of professionally accepted responses.[16] Wholly lacking in this case is any suggestion, by direct testimony or

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[14] Nor could such a claim reasonably be made. We think it is probably a matter susceptible of judicial notice that society is not offended generally by the notion that deadly force might be used to prevent the death of an innocent hostage, as evidenced world wide by governmental reaction to and methods of dealing with crisis situations such as airline hijackings and political kidnappings. That is all the more true in the context of a prison where control of a cellblock is at stake, given the recognition that society insists on security as the paramount objective within prison walls. *See Hudson v. Palmer*, 104 S.Ct. at 3201. Moreover, in this case, even plaintiff's own experts acknowledged that force, even deadly force, might be appropriate. The disagreement was in part on the timing of its use. (*See, e.g.*, Tr. 266, 314).

[15] *Cf. Estelle v. Gamble*, 429 U.S. at 107 (whether an X-ray or additional diagnostic technique or form of treatment is indicated is a classic matter for medical judgment; misjudgment at most is malpractice and not cruel and unusual punishment).

[16] *Cf. Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) (in determining

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inference, that injuries were inflicted in retribution or retaliation for the inmates' riotous and violent conduct. Because of those evidentiary shortfalls, there is no basis upon which the defendant prison officials should have been subjected to liability for money damages for the actions they took to restore control of the cellblock and to save the hostage's life.

The Ninth Circuit's resolution of this case forces prison officials to walk a constitutionally unacceptable fine line. In a riot, prison officials unquestionably have a duty to act to protect the life of hostages and to protect the personal safety of prison staff and the inmates themselves. *See Hudson v. Palmer*, 104 S.Ct. at 3200. Because of the conflicting security interests presented, institution officials are as easily subject to suit for the force they fail to use and the control they fail to exercise, as for the actions and force they do use.[17] We recognize that the Eighth Amendment demands that the need to take action not serve as a pretext or license for malicious or sadistic infliction of pain. The standard we advocate ensures against such abuse of governmental authority. But short of that evil, prison officials must be given appropriate latitude. They cannot and should not be deterred in their pursuit of their lawful objective by the shadow of lawsuits or by the knowledge that courts and juries, with no particular expertise,

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rights of the involuntarily committed to reasonable conditions of safety and freedom, the Constitution requires only that courts make sure professional judgment was in fact exercised; it is not apppropriate for courts to specify which of several professionally acceptable choices should have been made).

[17] This case underscores that fact. In a class action suit brought by the inmates, eventually without success, this isolated riot and the danger to the personal safety of non-rioting inmates was one circumstance the class pointed to in attempting to make out an Eighth Amendment claim based on the general conditions of their confinement. *See Capps v. Atiyeh*, 495 F.Supp. 802, 812 n. 16 (D. Or. 1980) and *Capps v. Atiyeh*, 559 F.Supp. 894, 903 (D. Or. 1982) (on remand).

will be free to second-guess their actions from the hindsight perspective of a distant courtroom rather than with deference to administrative expertise and the exigencies with which officials were confronted.

As already demonstrated, the decisions of this Court do not support the assertion that the Constitution requires prison officials confronted with a riot to choose the least forceful, as opposed to the most effective, means of quelling the riot and saving the lives of those at risk. It requires only that they not inflict "cruel and unusual punishment" in responding to the riot. The Ninth Circuit's decision erroneously gives an inmate the right to be subjected only to the least intrusive official measures conceivable to stop a prison riot. Moreover, the Ninth Circuit's resolution of plaintiff's challenge through application of a tort-like inquiry incorrectly leaves the boundaries of the Eighth Amendment to be set by the "expert" of a jury's choice. Thus, when the lower appellate court left it to the jury to weigh the expert testimony and pick and choose the opinion it prefers, it necessarily transformed the Eighth Amendment into the arbiter of competing penological opinions and philosophies, rather than a principle of law intended to protect against unacceptably harsh and brutal punishments. The Ninth Circuit thus erred, and its decision should be reversed.

III. The Ninth Circuit Misanalyzed Defendant Prison Officials' Claim of Qualified Immunity and Thus Erroneously Exposed Defendants to § 1983 Liability for Actions Taken to Quell a Prison Riot.

Unlike the Ninth Circuit Court of Appeals, the district court paid close heed to decisions of this Court when it granted the prison officials' motion for directed verdict on the alternate ground that the officers were immune from damages

liability. The district judge appropriately based this ruling upon his determination that "[h]ere, there was no clearly established constitutional right to be free from the use of deadly force administered for the necessary purpose of quelling a prison riot and rescuing a hostage." *Albers v. Whitley*, 546 F.Supp. at 737. A majority of the court of appeals, however, declined to engage in this type of analysis. Astoundingly, the majority viewed the question of a prison official's § 1983 liability as an all-or-nothing proposition when it equated entitlement to qualified immunity with liability on the merits of an inmate's Eighth Amendment claim:

> [A] new trial must determine whether Albers was subjected to cruel and unusual punishment under the "deliberate indifference" standard by defendants' use of excessive force against him. If it is determined that the prison authorities' conduct did not violate this standard, they are absolved of all liability under § 1983. If an eighth amendment violation is found, there is no qualified immunity defense available.

Albers v. Whitley, 743 F.2d at 1376.

The majority's surprising conclusion purportedly followed from its reasoning that findings on the merits issue and on the immunity question were mutually exclusive, reasoning that is hopelessly circuitous:

> [T]here is overlap between our eighth amendment analysis and the qualified immunity defense. A finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" *Haygood v. Younger*, 718 F.2d at 1483-84. *See Miller v. Solem*, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punishment would

> violate a right "clearl established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. ___, ___, 104 S. Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

Ibid.

The panel majority's equation of the qualified immunity issue with the issue of liability on the merits is patently incorrect. The majority not only bypassed the pertinent test of qualified immunity, it effectively attributed to the defendants the perspicacity to foresee, at the time they took action, that four years later the court would recognize a prisoner's constitutional right to be subjected only to the least intrusive official measures that might be taken to quell a prison riot.

The Ninth Circuit's resolution of the defendants' qualified immunity claim contravenes qualified immunity principles set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and restated most recently in *Mitchell v. Forsyth*, ___U.S. ___, 105 S.Ct. 2806 (1985). In *Harlow*, the Court recognized that an executive official's qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Forsyth*, 105 S.Ct. at 2816. From this characterization flows a principle directly at odds with the Ninth Circuit's unjustified merger of the analyses of a qualified immunity claim and the merits of the claimed violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment:

> [I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.

Ibid.

The Ninth Circuit panel majority did not perceive this analytical distinction even though the dissenting judge pointedly faulted the majority's merger of the immunity inquiry and a review of the merits:

> This incorrectly inserts a subjective element into the determination of an official's immunity. It also transforms qualified immunity from a question of law for the judge, to a question of fact for the jury."

743 F.2d at 1377 (Wright, J., dissenting).[18] As a result, the majority did not focus initially, as it should have, on the immunity question whether a right clearly had been established, before it examined the issue on the merits whether defendants had been deliberately indifferent to that right.

If the majority had stopped to pose the immunity question, it might have realized that the Eighth Amendment right it implicitly deemed to be clearly established was a prison inmate's right to be subjected only to the least drastic amount of force that might be used to suppress a prison insurrection. The court, however, glossed over the immunity issue. Consequently, the court failed to observe another lesson of *Harlow*: "[T]hat officials performing discretionary functions are not subject to suit when . . . questions [of the constitutional validity of their actions] are resolved against them only after they have acted." *Forsyth*, 105 S.Ct. at 2820; *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

Under *Harlow* and *Davis v. Scherer*, 468 U.S. ___, 104 S.Ct. 3012 (1984), defendant executive officials are entitled to immunity "so long as [their] actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Forsyth*, 105 S.Ct. at 2814, *quoting Harlow*, 457 U.S. at 818; *see also Forsyth*, 105

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[18] This Court noted last Term "that the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful." *Forsyth*, 105 S.Ct. at 2817 n. 10.

S.Ct. at 2818. The weighty public policy underlying this principle is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Forsyth*, 105 S.Ct. at 2815, *quoting from Harlow*, 457 U.S. at 819 and *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Due regard for that policy is particularly critical when prison administrators and personnel are confronted with a prison riot and the lives of hostages and inmates are at stake. It was therefore crucial in this case that the lower appellate court determine whether the law clearly proscribed the actions taken by the defendants.

The district court, in granting defendants' motion for directed verdict, and the circuit court minority, in arguing for affirmance, addressed this legal question and correctly concluded that defendants were entitled to qualified immunity given the dearth of constitutional law authority proscribing the use of deadly physical force to quell a prison riot. *Albers v. Whitley*, 546 F.Supp. at 737, and 743 F.2d at 1378 (Wright, J., dissenting).[19] The dissenting court of appeals judge recognized the error of the majority opinion. He pointed out that the majority decision was "the first case in which a federal court has countenanced a cause of action for cruel and unusual punishment arising from a prison disturbance." *Id.* at 1377 (Wright, J., dissenting). In specifically addressing the issue of defendants' entitlement to claim qualified immunity, the dissent said:

> No court has awarded damages to a prisoner injured in a prison riot. As evidenced by the divergence of opinion among us on this panel, the constitutional rights of prisoners during a prison riot are not well settled. These rights are not "clearly established" under *Davis*.

[19] Under state law, prison officials are immune from liability for "[a]ny claim arising out of riot, civil commotion, or mob action or out of any act or omission in connection with the prevention of any of the foregoing." Or. Rev. Stat. § 30.265(3)(e).

Id. at 1378. Bound up in its overlapping analysis of the merits and immunity, the majority failed to appreciate the significance of this point.

Nor did the circuit court decisions upon which the Ninth Circuit majority relied in simultaneously disposing of the immunity and the merits issues clearly establish standards to guide the official actions taken by Oregon State Penitentiary officials to stem a prison riot and rescue a hostage guard on June 27, 1980. *See Albers v. Whitley*, 743 F.2d at 1374-76. *Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980), *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), *Williams v. Mussomelli*, 722 F.2d 1130 (3th Cir. 1983), and *Jones v. Mabry*, 723 F.2d 590 (8th Cir. 1983) did not deal with prison riot situations. *Ridley*, *King*, and *Williams* involved alleged isolated beatings of prisoners. *Jones* was concerned with stringent administrative measures employed *after*, rather than during, a series of prison disturbances and escape attempts. Each decision was published *after* defendant prison officials acted in this case. But even insofar as decisions such as *King*, 636 F.2d at 73, looked to the case of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), as having established a constitutional standard for review of allegations of isolated beatings of inmates, they did so with regard to situations that are clearly distinguishable from the circumstances that defendants here faced.[20]

[20] Moreover, we question whether the least restrictive means standard adopted by the Ninth Circuit under the Eighth Amendment comports with the standard recognized in *Johnson v. Glick* as emanating from the Due Process Clause to protect a pre-trial detainee from isolated beatings:

> In determining whether the constitutional line has been

(Footnote continued on next page)

The Ninth Circuit's implicit resolution of the qualified immunity on the bases of *Miller v. Solem*, 728 F.2d 1020 (8th Cir. 1984) and its own prior opinion in *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983) *petition for rehearing en banc granted*, 729 F.2d 613 (9th Cir. 1984), evokes similar criticisms. The lower court majority viewed these cases as authority for adopting the extreme indifference standard of *Estelle v. Gamble*, a prison medical services case. as a restraint on official actions to put down an ongoing prison disturbance that involved the taking of a hostage and reports of the killing of an inmate. Neither *Miller*, which involved an inmate-on-inmate assault, nor *Haygood* which involved an inmate's claim of confinement beyond his release date, dealt with a situation comparable to that faced by defendant prison officials. Each decision was announced years after the Oregon penitentiary riot occurred.

(Footnote continued from previous page)

> crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and *whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.*

481 F.2d at 1033. Under the Ninth Circuit's formulation, the constitutional line could be crossed even where force sensitively and selectively was applied to restore order.

The decisions of the circuit courts that have employed a *Johnson v. Glick* type of test for identifying violations of the Cruel and Unusual Punishments Clause have involved isolated instances of violence directed at inmates by lower level officials, not riot/hostage situations. *E.g.*, *Norris v. District of Columbia*, 737 F.2d 1148 (D.C. Cir 1984) (inmate alleged single, unprovoked assault with mace, kicking and punching by four guards); *Smith v. Iron County*, 692 F.2d 685 (10th Cir. 1982) (pretrial detainee maced for refusal to stop pounding hole in wall with heavy metal drain cover); *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980) (single attack on inmate by guard); *Arroyo v. Schaefer*, 548 F.2d 47 (2d Cir. 1977) (pretrial detainees hit with gas intended for detainee who refused to return to his cell); *cf. Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir. 1975) (ill advised and unnecessary use of tear gas in the face of a minor disturbance was a reflex action and did not evidence punitive intent).

Moreover, in affirming summary judgment for prison officials who allegedly failed to prevent the stabbing of a prisoner by another inmate, the Eighth Circuit in *Miller* recognized as "clearly established" a prisoner's Eighth Amendment right "to be reasonably protected from known dangers of attacks by fellow inmates." *Miller*, 728 F.2d at 1024. Due regard for this right fairly can be said to have prompted the official action challenged in the present case, where the ringleader of the prison riot claimed to have killed one inmate and threatened to kill others.

At bottom, the only federal circuit case law establishing a prisoner's Eighth Amendment right to be free from the use of deadly physical force during a prison riot is the decision entered by the Ninth Circuit in this very case against these very defendants.[21] Despite the admonitions of this Court in *Navarette*, *Harlow* and *Davis*, the panel majority engaged in "hindsight-based reasoning" on the immunity issue. *See Forsyth*, 105 S.Ct. at 2820.

In sum, at the time Oregon correctional officers made the judgment to employ deadly force to quell a prison riot, to rescue a hostage guard, and to prevent inmate assaults on other prisoners, no clearly established law proscribed their action. This conclusion is buttressed by the fact that this Court evidently deemed the Eighth Amendment question presented in this case to be "sufficiently doubtful to warrant the exercise of its discretionary jurisdiction." *See, ibid.* Under *Navarette*, *Harlow*, *Davis* and *Forsyth*, the state corrections officials sued in this case for damages by the

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[21] *Cf. Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) (holding that prisoners were entitled to preliminary injunctive relief under § 1983 and the Eighth Amendment from abuse and mistreatment by prison guards acting in reprisal *after* state officials had suppressed a prison revolt and had regained control of the correctional facility from rioting prisoners.)

prisoner plaintiff are immune from liability.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed. The case should be remanded with instructions to reinstate the judgment for petitioners that was issued by the district court.

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APPENDIX A

SELECTED WITNESS TESTIMONY SUMMARIES

1. *The decision to use potentially deadly force.*

a) *Plaintiff's evidence.*

As part of his case in chief the plaintiff introduced the deposition testimony of four prison officials, Clayton Jacobs, petitioner Harol Whitley, David I. Jackson, and Merritt Barth, and testimony from petitioner J.C. Keeney. Their statements regarding the official decision to use potentially deadly force to put down the prison riot involved in the case is summarized below.

Clayton Jacobs, a captain at Oregon State Penitentiary (OSP) (Tr. 208), testified that he was responsible for the institution the night the riot broke out. (Tr. 210). He called defendant Whitley, discussed the situation with him, and then went to the arsenal where he obtained "gas and equipment." (Tr. 210). Jacobs and Whitley spoke to inmate Klenk, the leader of the disturbance, on at least two occasions in the corridor leading to A Block. (Tr. 211-12). During one of these contacts Whitley talked to the guard taken hostage, Sergeant Fitts. Fitts informed Whitley that he was "fine." (Tr. 214). Jacobs observed that the barrier, constructed by inmates to limit cellblock access, was larger than when he first observed it. (Tr. 215). An initial decision was made to use gas (Tr. 213), but that decision was never made "concrete." (Tr. 216). Once the decision to use shotguns was made, instructions were given to shoot low because "[t]hey weren't interested in killing anyone." (Tr. 218). Whitley said to fire a warning shot as guards went in over the barricade to make the inmates get their heads down. (Tr. 218). Jacobs did not recall "any real comments regarding the use of the warning shot to get the inmates back into their cells" (Tr. 218), although the prison officials "pretty well knew" that

many inmates would go to their cells and that was what prison officials wanted. (Tr. 218-19). When asked why gas guns were carried in addition to shotguns, Jacobs described one possible event that could have prompted the use of gas:

> Answer: . . . Well, one thing is we didn't go into A Block with the intention of killing any of those people. The shotguns, in my mind, were used to control the situation so we could get in and get to Sergeant Fitts before anything happened to him. Then if it was necessary to use gas, I imagine we would have used it rather than shooting people with shotguns.
>
> Question: So if in fact Sergeant Fitts was placed into a safe position but inmates continued to act out in some way, then the gas might appropriately have been used?
>
> Answer: Possibly.

(Tr. 221).

Harol Whitley, Director of Institution Security at OSP (Tr. 267)[1] and a defendant in this case, testified that the purpose of the warning shot was to "desburse [*sic*] the inmates." (Tr. 236). He believed that most of them would fall face down on the floor when the first shot was fired. (Tr. 236). For that reason he had the second and third shotguns behind the first to respond to inmates who might get up and attack people from behind. (Tr. 236). Although aware that some inmates might react by heading up the stairs to their cells (Tr. 236), Whitley instructed the officers armed with shotguns to shoot anyone who started up the stairs in the direction of the cell where the hostage was being held. (Tr. 239). Whitley thought that the person who shot Albers believed that Albers was either "after me because I had ran past him, or was heading toward that cell to help Klenk with Sergeant Fitts." (Tr. 238-39).

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[1] Whitley was incorrectly identified in the complaint as Assistant Superintendent at OSP.

David I. Jackson, a lieutenant at OSP (Tr. 242), testified that he entered A Block armed with a 12-gauge shotgun (Tr. 247) loaded with number six shot. (Tr. 248). His instructions were to shoot at the knees or lower of anyone headed toward cell 201, where the hostage was being held. (Tr. 248).

J.C. Keeney, Assistant Superintendent at OSP (Tr. 465) and a defendant in this case, testified that the assault squad was organized in a line formation before they went over the barricade. (Tr. 322-24). Keeney stated that the first priority in the decision to go into the cellblock was the safety of Sergeant Fitts, the hostage. (Tr. 246). He described the decision as "tough . . . we haggled over it for a long time and did a lot of soul searching over it." (Tr. 246).

Merritt Barth, a lieutenant at OSP (Tr. 348), testified that Whitley and Keeney had discussed the use of gas and rejected it "for a couple of given reasons," (Tr. 350), including the fact that the only exit out the back was blocked,[2] and that gas would be ineffective because the solid nature of the cell doors would allow an inmate to close the door, put a blanket underneath, and thereby prevent the gas from entering. (Tr. 350). Barth was instructed to follow the officers carrying shotguns to prevent inmates from assaulting the armed officers from behind. (Tr. 351).

b) *Defendants' evidence.*

Harol Whitley testified that inmate Klenk told him that Klenk would personally cut the hostage's throat if Whitley attempted to rush the cellblock, (Tr. 369), that inmates were going to kill the "rapos" and "niggers," and that one "rapo" had already been killed. (Tr. 372).

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[2] Plaintiff's expert, Mr. Lou Brewer, had previously testified that accepted corrections procedure when using gas included leaving an avenue for inmates to escape from the gas. (Tr. 288).

Prison officials first decided to go into the area of the disturbance with tear gas. (Tr. 372-33). While approaching the cellblock entrance, Whitley discovered that the barricade had been moved closer to the entrance and that he could not budge it when he leaned against it to see if it could be pushed out of the way. (Tr. 373). When Whitley was taken to see the hostage, Klenk held a knife against Whitley's throat and threatened again to kill the hostage in the event of an assault. (Tr. 374).

Contrary to the stipulated facts, Whitley denied that the two inmates in cell 201 had told him that they would protect the hostage. (Tr. 383). He testified that he believed it was possible that they would support Klenk and perhaps try to kill Sergeant Fitts. (Tr. 384).

Whitley informed Keeney that he believed that gas was impractical because the barricade was not movable and only one person at a time could get over it.[3] (Tr. 374). According to Whitley, gas would have been ineffective because "[y]ou could not have got enough gas into the cellblock to have had any effect on anyone . . . You could not get people over quick enough to, in my opinion, get to Klenk before he would get to the hostage." (Tr. 379). While inside, Whitley had heard one inmate "hollering" for help. It sounded like someone was beating him. (Tr. 374). Whitley explained his observations to Superintendent Cupp, and included a description of the problem presented by the barricade. (Tr. 374-75). Cupp authorized the use of shotguns to get the hostage out. (Tr. 375).

Whitley instructed the assault team that he would make one more effort to talk with Klenk and to try to obtain the

[3] Plaintiff's expert, Mr. Lee Perkins, had previously testified that it would take tear gas 20 to 25 seconds to "begin to come up," (Tr. 312) and two and a half to three minutes to fill the room "and it might not totally fill the room at all." (Tr. 312).

release of Sergeant Fitts without the use of force. If that was unsuccessful he would "holler," "come on Kennicott" (Tr. 375). Kennicott was instructed to fire a warning shot into the wall and then, if anyone headed for the cell where Fitts was held, to shoot them. (Tr. 375, 397).

Robert L. Kennicott, a captain at OSP (Tr. 457) and a defendant in this case, testified that he was called from home the night of the riot. When he arrived at cellblock A he observed a riot squad in formation with shotguns, gas guns and riot batons. (Tr. 458). He was instructed to fire one shot to disperse the inmates, to shoot low if shooting someone, and to shoot anyone heading toward cell 201. (Tr. 458).

J.C. Keeney testified that the moving and strengthening of the barricade markedly changed the situation, and that the combined factors of the blocking of the only escape route and the movement of the hostage to an upper tier cell rendered gas too dangerous to the hostage. (Tr. 467, 499-500).

Hoyt C. Cupp, Superintendent of OSP (Tr. 506) and a defendant in this case, testified that upon his arrival at OSP he was briefed by Keeney, Whitley and other institutional personnel. He was given information including: The taking of Sergeant Fitts as a hostage and the resultant danger to Fitts' life; the inmates' failure to obey the cell-in order; the destruction of furniture; the physical attack on at least one inmate; the fact that several inmates were armed with clubs and that one had a knife that he was threatening to use; the accelerating destruction and violence, including a disturbance starting in an adjacent cellblock; the abandonment of the plan to use chemical agents because of the barricade and the closed emergency exit; and the failure of attempts at discussion with the inmates. (Tr. 510-11, 515).

Agreeing that tear gas would be ineffective, Cupp, with the assistance of Keeney and Whitley, formulated a new

plan. Cupp ordered the use of shotguns "as the proper and expedient means to prevent almost certain loss of life of the hostage, as well as inmates." (Tr. 511). An additional factor favoring the use of shotguns was the fact that cells in A Block have walls rather than bars, that would protect any inmate who had obeyed the cell-in order from shotgun pellets. (Tr. 512).

2. *The experts.*

a) *Plaintiff's experts.*

1) *Lou Brewer*

Mr. Brewer, a former superintendent of prisons in Iowa and Illinois (Tr. 257-58), testified to a number of actions, short of the use of firearms, which he believed could or should have been employed to control the inmate disturbance. The first was communication with the ringleader to determine his motivations, and to attempt to reason with him. (Tr. 262). He testified that he had "reservations" whether this option was fully explored (Tr. 263), although he appeared to agree that the attempt might have been unsuccessful in light of plaintiff inmate Albers' testimony that Klenk was high. (Tr. 279).

Mr. Brewer testified that other options such as gas, shields and riot batons, and subduing the leader should have been considered. When asked if there was any "correctional reasoning" that he could discover for the decision to abandon the original plan involving tear gas, Mr. Brewer testified that he did not "really relate to why that course of action was abandoned." (Tr. 264-65). Mr. Brewer also did not "relate" to the impact that moving the barricade would have had on the decision not to use gas. (*Id.*) Mr. Brewer conceded that he did not know how long it would take for gas to be effective in A Block (Tr. 283-84), and he was unclear about the importance and availability of an escape route. (Tr. 285-88).

Mr. Brewer was unable to find any support in the material he reviewed for the proposition that the riot was spreading. (Tr. 261). He suggested that Whitley could have attempted to disable Klenk during the course of one of their conversations (Tr. 267-68), although he apparently admitted that the attempt to do so single-handedly, in the presence of ten to fifteen other prisoners, would not be sound correctional practice. (Tr. 281-82).

Mr. Brewer testified that some form of warning that action was imminent, coupled with an opportunity for non-participants to exit would have been appropriate. (Tr. 268-70). Mr. Brewer acknowledged that Albers had plenty of notice "that at some point [the use of firepower was] likely to occur." (Tr. 292).

Additionally, Mr. Brewer suggested that the use of riot batons would have been appropriate (Tr. 266), and he agreed that clubbing the inmates into submission was "a possibility." (Tr. 289-90). He also acknowledged that riot batons could have caused death or permanent disability. (Tr. 289). Mr. Brewer offered the opinion that the actions taken by Oregon prison officials constituted the use of deadly force and that the use of deadly force was excessive and not necessary. (Tr. 266).

2) *Lee H. Perkins*

Mr. Perkins, a former commander of the Multnomah County (Oregon) Courthouse jail (Tr. 299), suggested, as an alternative to the measures taken by defendants, the use of various riot formations and an entry through a door into the second tier. (Tr. 311). When informed that the door to which he referred was plugged, Mr. Perkins indicated that that fact would change his plan. (Tr. 316-17).

Mr. Perkins suggested that a rifleman could have been posted to "immobilize" anyone going to cell 201 "with one

shot." (Tr. 311). The fact that it would have been necessary to shoot past as many as fifty inmates to do so did not change his view. (Tr. 316).

Mr. Perkins suggested that the assault team could have stormed the barricade and sealed off the stairwell. (Tr. 313). In his opinion, the defendants were "possibly a little hasty in using the firepower on them." (Tr. 314).

b) *Defendants' experts.*

1) *W. James Estelle, Jr.*

Mr. Estelle, the Director of the Texas Department of Corrections (Tr. 433), testified that the verbal warnings of the "stop or I'll shoot" variety would be appropriate if the circumstances permitted. (Tr. 446). Given the circumstances of this case, however, verbal warnings would have further endangered the hostage by alerting the principal inmate rioter and his supporters. (Tr. 438, 450).

Mr. Estelle testified that gas would have been ineffective to confuse, disable and disengage the hostile inmates. In his view, there was no way to get the massive amount of gas needed into the cellblock before the rioters could have reached the cell where the hostage was held. (Tr. 439).

Mr. Estelle offered the opinion that the use of shotguns, under instructions to shoot any inmate heading for cell 201 where the hostage was held, was both reasonable and necessary under the circumstances. Mr. Estelle agreed that the performance of prison officials was consistent with modern accepted prison riot control procedures; and he stated that he would have difficulty giving an example of "more courageous and appropriate action by a group of corrections personnel under that kind of trying circumstances." (Tr. 437).

2) *Roger W. Crist*

Mr. Crist, the Secretary of the New Mexico Corrections Department (Tr. 540), testified that the option of attempting

to talk to the rioters had been exhausted as a reasonable alternative. (Tr. 547, 558-59). According to Mr. Crist, an attempt by Whitley individually to disable Klenk would have had the probable effect of causing other inmates to jump in on Klenk's side. (Tr. 550-51). Mr. Crist saw no need for a separate, on-site commander who, unlike Whitley, would not have participated in the actual assault. (Tr. 565).

The narrow space for cellblock entry and the barricade combined, in Mr. Crist's opinion, to make it impossible to get sufficient manpower in quickly enough to make riot batons practical. (Tr. 551). Mr. Crist described the factors in this situation which distinguished it from a former situation in which he had employed a sniper to save a hostage, but in which the hostage-taker had been killed. (Tr. 543-48).

Mr. Crist testified that although verbal warnings of intent to shoot would be appropriate if time permitted, under the circumstances of this case the warning shot was much more effective than a verbal warning would have been. (Tr. 554, 556, 563). Mr. Crist agreed with the defendant prison officials and Mr. Estelle that verbal warnings before entering the cellblock with force would have tipped the defendants' hand about their intention. Based upon Klenk's threat to kill the hostage, he stated that the element of surprise was extremely important. (Tr. 548-49). In his opinion, Whitley's action in coming over the barricade without weapons surprised everyone in the block and took command of the situation. (Tr. 549-59).

Mr. Crist agreed that the use of firearms was reasonable and that less forceful alternatives were not reasonably available. (Tr. 552). He endorsed the order to shoot inmates headed toward cell 201 where the hostage was held. (Tr. 552). In his opinion, the instructions to shoot toward those headed to cell 201 was reasonable, "particularly in view of the fact that the orders were to shoot low so the intent was not to

kill anyone, but to provide the least amount of damage and still control the situation." (Tr. 552). Mr. Crist described the defendants' response was as "almost a textbook model" of modern accepted prison riot control procedures. (Tr. 553-54).